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Free Wives of Convicts and Land Ownership in Early Colonial New South Wales

Laura Donati
Monash University

In the late eighteenth and early nineteenth centuries, free wives of convicts occupied a unique position in New South Wales as they could possess land in their own names, a right typically denied to married women under the common law of coverture. Free women married to convicts were able to become landholders because their husbands' legal standing as felons temporarily suspended their wives' legal disabilities.¹ For free wives of convicts, a complex relationship developed between their legal status as wives, their husbands' status as convicts and early colonial land ownership ideas and practices. Thus, while women in early New South Wales faced legal and economic disabilities, they were not all affected in the same manner and to the same degree. This article explores the intricate relationship of free wives of convicts and how this particular group of women was able to exercise their legal agency to acquire and retain land. It begins with a discussion on marriage, women and free wives of convicts, followed by an exploration of what land meant to early colonists. It then examines how three free wives of convicts — Sarah Toole, Mary Collitts and Jane Ezzey — sought to obtain or retain land in their own names through grants and the threat of litigation.² In so doing, it also examines some privileges they were accorded, namely being assigned their convict husbands as servants. The article concludes by considering how free women's access to land ownership declined from the mid-1810s and how this served to further differentiate free wives of convicts from those married to free men.

The focus of the article is largely on the period 1790 to 1814. It was in 1790 that the first of approximately 105 free wives of convicts arrived in the embryonic colony from Britain and Ireland as they

¹ Here the term 'disability' is used in the legal sense, as demonstrated in Blackstone's description of coverture in his Commentaries: 'even the disabilities which the wife lies under are for the most part intended for her protection and benefit'. W. Blackstone, *Commentaries on the Laws of England*, Vol. 1, cited in C. Zaher, 'When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture', *Law Library Journal*, Vol. 94, No. 3, 2002, p. 460.

² For an explanation of microhistory and free wives of convicts see L. Donati, 'Free Wives of Convicts under the Gaze of Microhistory: An Alternate Approach', unpublished paper presented at the Pacific Coast Branch American Historical Association, 109th Annual Meeting, Hawai'i, 2016.

accompanied or followed their husbands who were sentenced to transportation. It concludes in 1814 as this was the year a muster of the general population was held, thereby providing an opportunity to ascertain just how many free wives of convicts resided in New South Wales at that time. Likewise, it was the year the colonial legal system was substantially developed with the abolition of the Court of Civil Jurisdiction and the establishment of the Supreme Court.

In exploring the relationship between free wives of convicts and land possession, this article sheds light on a historically marginalised group of women. For too long, free wives of convicts have been overlooked by historians as their convicted contemporaries, together with the colony's powerful and influential free settlers, have dominated the historiography.³ Although their presence and activities are evident in archival collections, historians have barely examined how women's legal status affected their lives, whether it be legal, familial, social or financial. It was an impact, however, that was fluid and was continually shifting as the colony evolved. Portia Robinson and legal historian Bruce Kercher were among the first scholars to acknowledge free wives of convicts and since then a growing number of scholars are continuing to redress this oversight.⁴ By inserting free wives of convicts into the colonial narrative, our view of early colonial society becomes more intricate and complicated.

The first free wives of convicts arrived in New South Wales in 1790 on the *Neptune*, only two years after the penal colony was established. They were Ann Bockerah, Sarah Cobcroft, Sarah Fielder, Harriett Hodgetts, Maria Wood and Elizabeth Connor, all of whom traveled with their convict husbands to Sydney on the 'Second Fleet'. By 1814, approximately 105 free wives had followed their convicted husbands, upon conviction and sentence of transportation, from

³ On convict women, see for example, A. Salt, *These Outcast Women: The Parramatta Female Factory 1821-1848*, Sydney, 1984; B. Smith, *A Cargo of Women: Susannah Watson and the Convicts of the Princess Royal*, Sydney, 1988; D. Oxley, *Convict Maids: The Forced Migration of Women to Australia*, Melbourne, 1996; J. Damousi, *Depraved and Disorderly: Female Convicts, Sexuality and Gender in Colonial Australia*, Cambridge, 1997; K. Daniels, *Convict Women*, Sydney, 1998; K. McCabe, 'Discipline and Punishment: Female Convicts on the Hunter', *Journal of Australian Colonial History*, Vol. 1, No. 1, 1999, pp. 38-61; E. Ihde, 'Send more prostitutes: An Alternative View of Female Sexuality in Colonial New South Wales', *Journal of Australian Colonial History*, Vol. 4, No. 2, 2002, pp.35-50.

⁴ P. Robinson, *The Women of Botany Bay: A Reinterpretation of the Role of Women in the Origins of Australian Society*, Melbourne, 1993; B. Kercher, *Debt, Seduction and Other Disasters*, Sydney, 1996; G. Karskens, *The Rocks: Life in Early Sydney*, Melbourne, 1997.

Britain and Ireland to New South Wales.⁵ Usually they travelled on the same ship as their husbands or arrived within a year of their spouses' arrival.⁶ Other women, such as widows or those who had arrived as children after accompanying their free or convict parent(s) to the colony, married felons once in New South Wales. It is important to note that free wives of convicts did not come from a particular class or background but inhabited nearly all tiers of society and came from a range of different environments, each with their own dreams, expectations, abilities and skills.

* * *

In the colony, married women's legal and economic rights, activities and capabilities were embedded in English law which arrived with the 'First Fleet' in 1788. Under the English common law of coverture, a wife's legal and economic identity was suspended as she came under the control of her husband. When describing coverture, William Blackstone, an eighteenth-century English jurist, wrote:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing [sic].⁷

Subsequently, a wife became a *feme covert* and her property, income and money became the possession of her husband, as did her debts.⁸ Legal proceedings could only be entered into on her behalf by her husband and she was unable to sign contracts unless her husband granted her permission to act as his agent.⁹ While a married woman had her legal and economic rights and abilities subordinated, an unmarried woman or a widow was classified as a *feme sole* and was accorded full legal rights and capabilities. That is, unmarried women

⁵ This figure excludes Tasmania. C. J. Baxter (ed.), *General Muster of New South Wales 1814*, Sydney, 1987; C. J. Baxter (ed.), *Musters and Lists New South Wales and Norfolk Island 1806*, Sydney, 1988; 'New South Wales, Colonial Secretary Office, Settlers' Muster Book, 1800', Microform, GM200 CY, Reel 204, State Library of Victoria (SLV).

⁶ L. Donati, 'Free Wives of Convicts: The Really Forgotten Women of Botany Bay', PhD thesis, Monash University, 2018.

⁷ Blackstone, *Commentaries on the Laws of England*, Vol. 1, in Zaher, *op. cit.*, p. 460.

⁸ C. Bishop, 'When Your Money is Not Your Own: Coverture and Married Women in Business in New South Wales', *Law and History Review*, Vol. 33, No. 1, 2015, p. 182.

⁹ B. Kercher, *An Unruly Child: A History of Law in Australia*, Sydney, 1995, p. 50.

and widows could sign contracts, operate businesses, initiate legal disputes and own land, all in their own names as individuals. Coverture was essentially a relationship of reciprocal rights between a husband and wife. While a wife subordinated her identity under that of her spouse, her husband became responsible for her actions. Her debts became his and he became liable for any contracts or crimes she committed in his presence.¹⁰ He was also required to provide her with the necessities of life, such as food and clothing, although this was difficult to ensure.¹¹

During this early colonial period, women's legal status was not static but somewhat precarious. With financial constraints making marriage an attractive option for many women who were unable to support themselves, coupled with society's high mortality rates (especially for men), a woman may have passed through the stages of marriage and widowhood numerous times in her life.¹² The example of Mary Rose who arrived in the colony with her free parents in 1793 at the age of eleven, highlights just how tenuous and fluid a women's status was in New South Wales. In 1800, at the age of eighteen, Mary married William Green in Sydney but soon became a widow with three young children to provide for. Consequently, her legal status and capabilities changed as she went from being a *feme sole* to a *feme covert* and back to a *feme sole*. In 1807, she became a *feme covert* once again when she married former prisoner, Henry Murray. In 1812, however, Henry hanged himself, thereby returning Mary to widowhood and the legal status of *feme sole*. Two years later, Mary married James Singleton, a free man and a miller, again restoring her to the status of *feme covert*, a position she held until her death in 1838.¹³ In the span of just fourteen years, Mary's legal status changed six times. With each alteration, her legal capability to own property, conduct business dealings, represent herself in court and act autonomously in legal and financial matters changed in an instant.

For free wives of convicts, the common law of coverture was temporarily suspended while their husbands completed their

¹⁰ H. Golder and D. Kirkby, 'Marriage and Divorce Law Before the Family Law Act 1975', in D. Kirkby (ed.), *Sex, Power and Justice: Historical Perspectives of Law in Australia*, Melbourne, 1995, p. 156.

¹¹ Kercher, *Debt, Seduction and Other Disasters*, p. 67.

¹² Golder and Kirkby, *op. cit.*, p. 155.

¹³ See entries on 'Mary Rose', 'William Green', 'Henry Murray', 'James Singleton', 'Thomas Rose', 'Jane Rose', *Biographical Database of Australia Online*, <www.bda-online.org.au/> (17 August 2017).

sentences. Those felons who had originally been sentenced to death but had their death sentences commuted to transportation instead were attained. Under the doctrine of felony attain, convicts who had been initially sentenced to death but reprieved on condition of transportation were legally dead until they had served their sentence, meaning they were unable to own property or conduct business activities in their own names, or sue for recompense.¹⁴ In 1813, Governor Macquarie articulated this when he stated, 'while a man is under the sentence of the law, he is not eligible to be employed in any place of trust. He is incapable of holding a grant of land'.¹⁵

To ensure one spouse in the marriage between the free and the convicted had some legal agency, free wives of convicts were treated as *femes sole*, that is, with full legal rights and abilities. Thus, the colonial courts and government followed the English convention, as advocated by Blackstone who believed 'it would be most unreasonable' to prevent free wives of convicts exercising their legal abilities if their husbands were 'banished, for then he is dead in law'.¹⁶ Consequently, free wives of convicts operating as *femes sole* could possess land in their own names while free wives married to free men were denied such abilities. Sarah Bockerah illustrates the reality of how coverture affected women's ownership of land. Sarah, the orphaned daughter of a free mother and a convict father, was granted fifty acres of land as a single woman after the departure of Governor Bligh. When she sought confirmation of ownership from Governor Macquarie in 1810, her legal status had changed as she had married an emancipated convict, John Lawrence. Macquarie confirmed that Sarah had indeed been the legitimate owner of the property but stipulated the grant was 'to be renewed in the name of her husband John Lawrence, now free'.¹⁷

As a colony in its infancy, there was much fluidity in law and felony attain was not always followed. The very first civil court case heard in New South Wales was initiated by Henry and Susannah Kable, two married attainted convicts who had no legal ability to sue under the common law of felony attain. In hearing *Kable v. Sinclair* (1788), the

¹⁴ Blackstone, *Commentaries on the Laws of England*, Vol. 4, cited in Kercher, *Debt, Seduction and Other Disasters*, p. 49.

¹⁵ Macquarie to Bathurst, 28 June 1813, cited in M. Phillips, *A Colonial Autocracy: New South Wales Under Governor Macquarie, 1810-1821*, London, 1909, p. 199.

¹⁶ Blackstone, *Commentaries on the Laws of England*, Vol. 1, cited in Kercher, *Debt, Seduction and Other Disasters*, p. 66.

¹⁷ M. Flynn, *The Second Fleet: Britain's Grim Convict Armada of 1790*, Sydney, 2001, p. 163.

colonial court not only asserted that the couple could sue but that they could retain property, in this case, the goods Henry and Susannah claimed were lost by the captain of their transport ship, a loss they wanted to be compensated for. Felony attain was likewise a slippery concept in the American colonies when British convicts were transported there before the war between the American colonies and Britain (1775-1783) and the establishment of the penal colony at Port Jackson.¹⁸ This was a situation far removed from England where felony attain was strictly enforced as convicts' ability to sue, provide evidence in court and acquire new property was disabled and where their property came under the possession of the Crown, including profits from freehold land.¹⁹

* * *

The possession of land was 'the defining feature of settler colonisation'.²⁰ With the arrival of the 'First Fleet' in 1788, all land in New South Wales came under the custody of the English monarch, King George III. Through the Indigenous people's dispossession of land, soldiers, settlers and emancipated convicts acquired theirs. In early New South Wales, land ownership did not have the same social status and political implications as it did in Britain. Unlike Britain where land was the preserve of the aristocracy and typically unavailable for purchase, the possession of land in the colony was not tied to class, nor did people derive their political and economic power from it, or at least not in the opening decades of colonisation.²¹ Land in New South Wales was issued or available for purposes of settlement, particularly agriculture and cultivation. It was domesticated farm animals and grain that had greater worth as they were scarcer and more sought after than land which was so readily available. In 1804, the proprietor of a 'neat, eligible and commodious dwelling house ... with a proportion of good garden ground and an extensive run for stock at the back' advertised a property for sale. Instead of a cash payment, though, 'the principal part of two payments will be accepted

¹⁸ See B. Kercher, 'Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700-1850', *Law and History Review*, Vol. 21, No. 3, 2003, pp. 532-41.

¹⁹ Blackstone, *Commentaries on the Laws of England*, Vol. 4, cited in Kercher, 'Perish or Prosper', p. 536.

²⁰ H. Golder and D. Kirkby, 'Land, Conveyancing Reform and the Problem of the Married Woman in Colonial Australia', in D. Kirkby and C. Coleborne (eds), *Law, History and Colonialism: The Reach of Empire*, Manchester, 2001, p. 207.

²¹ Kercher, *Debt, Seduction and Other Disasters*, p. xx.

in grain or pigs'.²² It was only when population numbers increased and governors believed land was running out that property began to hold significant monetary value.

Land was desirable not as a commodity in itself but for what it could produce. Through production and farming, people had the potential to become wealthy, financially secure, or at the very least, independent and self-sufficient. Depending on its location and acreage, land was cultivated for wheat and other food crops, grazed with stock (during this early period it was typically goats, poultry, pigs and a few horses) or leased for a fee. In Sydney and outlying towns, dwellings and shops could be erected and then rented for short or long periods of time. This was especially attractive for female proprietors in Sydney where accommodation was scarce (and thus a lucrative business for them with premium prices charged for rooms and houses) and where the role of landlady was an acceptable occupation for those occupying the middle tiers of the colony's social hierarchy.

Property was particularly important for women since it provided them with the means to engage actively in the economy, whether as buyers and sellers of property, landladies or as traders of food and goods produced on the land. It also enabled them to increase their business activities and holdings by acting as loan collateral and demonstrating their creditworthiness, thereby enabling them to access credit and expand their business activities.²³ This is illustrated by the activities of Sarah Wills, an entrepreneurial free wife of a convict who arrived in the colony in 1799. While her husband was serving his sentence, Sarah sold her Sydney property in the area known as the Rocks to Lewis Jones in 1802. The purchase price was £25, to be paid in cash installments.²⁴ The payment in cash was important as it enabled Sarah to partake in other financial activities and expand her business endeavours.

Free women acquired property in their own names in a variety of ways. Some free spinsters, widows and wives of convicts were granted land by the government or, if they had the means, bought it. Other women were bequeathed land after the death of a parent or spouse or

²² *Sydney Gazette*, 29 April 1804, p. 4.

²³ K. Anderson, *The Foundations of Female Entrepreneurship: Enterprise, Home and Household in London, c.1800-1870*, New York, 2009, p. 107.

²⁴ New South Wales Judge Advocate, Register of Assignments, Book 1, A3609, Mitchell Library, Sydney.

upon the end of a marriage or relationship. In 1808, Benjamin Pate put a notice in the local newspaper explaining his separation from his wife and stating that he 'agreed to give her the said Mary the stone house I lived in on the Rocks, with all the furniture, &c. forever, as a permanent support for her'.²⁵

* * *

As illustrated by Sarah Toole, a free wife of a convict, the possession of land was bound with colonial perceptions of social morality and was interwoven with ideas about being virtuous and deserving, of behaving with honour and integrity, of reformation. For the Imperial and colonial governments, land was not only central for producing food crops and raising stock to sustain the population but also as a means of reforming errant convicts. Government officials and many of the colony's residents envisaged a society of honest and industrious yeomen where subsistence through agriculture reigned, a new society arising from the faulty characters of former convicts, 'by seclusion in the country, and keeping their bodies and minds in a healthy state through ... wholesome labour, their old thievish habits gradually wear off'.²⁶ This reform, however, focused largely on men as it was through hard manual toil as labourers that male felons were to redeem themselves and be rehabilitated. It is for this reason that freed convicts of good character were granted land by the colonial government.

Before leaving for Botany Bay to establish the colony of New South Wales, the British government instructed Governor Phillip to emancipate male convicts, 'who shall, from their good conduct and a disposition to industry, be deserving of favour', and grant them land. Phillip was instructed that 'to every male shall be granted 30 acres of land, and in case he shall be married, 20 acres more; and for every child who may be with them at the settlement at the time of making the said grant, a further quantity of 10 acres'.²⁷ However, grants were conditional on the grantee residing on the property, cultivating or undertaking improvements on it and paying the annual quit rent as

²⁵ *Sydney Gazette*, 1 January 1809, p. 1.

²⁶ A. Atkinson, *The Europeans in Australia, Vol. 1: The Beginning*, Melbourne, 1997, p. 76; P. Cunningham, *Two Years in New South Wales*, Sydney, 1966, p. 280.

²⁷ Governor Phillip's Instructions, *Historical Records of Australia, Series 1 (HRA 1)*, Vol. 1, p. 14.

specified by the governor providing the land. Successive governors were issued with similar instructions.²⁸

The relationship between land and morality extended beyond emancipated criminals to include free settlers. Again, the colonial government tried to ensure that only those supposedly *deserving* of land received it. The treatment of couples living in *de facto* relationships (as opposed to being married) highlights the connection between land and morality. The colonial government and religious officials perceived such unions as morally corrupt and women in them were labelled 'prostitutes' and 'concubines'.²⁹ In an attempt to minimise these relationships, a newly emancipated male convict, when offered a grant of land by the governor, received no additional land for his *de facto* wife, even if they had been living together for many years. A further example of how people in unwedded relationships were penalised is Governor Macquarie's 1810 proclamation declaring women were unable to inherit the property of their male partners if they were not married to them. Macquarie justified his stance on 'the sole ground of having lived for a number of years with the deceased in a state of illegal and criminal intercourse'.³⁰ Some couples, however, had no choice but to live in *de facto* unions as they were already married with spouses in Britain or Ireland.

The story of Irishwoman and free wife, Sarah Toole, demonstrates how morality was tied to land possession and how important land was for improving people's lives. In 1814, Sarah and her two small children stepped off the *Broxbornebury* after 126 days at sea. There she waited to be reunited with her convict husband, Bernard Toole. Bernard, an Irish labourer, arrived on the convict transport *Somersetshire* three months later, having been sentenced to fourteen-years transportation at the Cumberland Assizes in August 1813. In the colony, Sarah and Bernard struggled to support themselves. Unable to feed their family, they were put on 'the store' and were provided with food rations from the colonial government. In May 1817, Sarah wrote a letter to Governor Macquarie explaining her dire circumstances and requesting a grant of land to improve her situation and that of her family. She wrote:

²⁸ *Ibid.*, p. 523; Governor Hunter's Instructions, *HRA 1*, Vol. 1, p. 523.

²⁹ S. Fisher, 'Sydney Women and the Workforce 1870-90', in M. Kelly (ed.), *Nineteenth-Century Sydney: Essays in Urban History*, Sydney, 1978, p. 95; Salt, *op. cit.*, p. 36.

³⁰ Kercher, *An Unruly Child*, p. 51.

the most humble memorial of Sarah Toole showeth that memorialist came to this colony a free woman ... That memorialists husband came at the same time... a prisoner ... That memorialist and husband [since] their arrival in the colony ... had conducted themselves honest and industrious. That memorialists husband has been [laboring on farms] ... and this earning being inadequate to the support of his wife and children most humbly solicits a portion of land for the future support of memorialist and children. May it therefore please your excellency to grant her such indulgences.³¹

A note on the memorial by the emancipated Catholic preacher, Reverend Henry Fulton, explained that the 'memorialist lived sometime in this neighbourhood and conducted herself with sobriety, honesty and industry'.³² References to honesty, sobriety and hard work were critical to Sarah's chances of being considered worthy of a grant of land. In 1820, Sarah became the grantee of a 745-acre property.³³

Sarah's request for land was made specifically as a free wife of a convict, as demonstrated by the inclusion in the letter of her and her husbands' legal status. Sarah understood that, even though Bernard had obtained a ticket of leave, he would not be granted land as he was still technically a prisoner, but she, as a free wife of a convict, would have a greater opportunity of acquiring it. Consequently, Sarah was instrumental in providing for the security and prosperity of her family that stretched far beyond the boundaries of home. By possessing land, the family could rise above their subsistence living and derive an income from agricultural or pastoral pursuits, rent or lease the land or sell it (hopefully) for a profit. Through the acquisition of land as a result of her status as a free wife of a convict, Sarah had the potential to secure financial independence for her family.

* * *

The possession of land by free wives of convicts gave rise to a most unusual situation and one that was particular to New South Wales, that of free wives becoming 'mistresses' to their assigned prisoner

³¹ Memorial of Sarah Toole, 29 May 1817, State Archives and Records New South Wales (SANSW), 4/1825B.

³² *Ibid.*

³³ Colonial Secretary, 'Alphabetical Index of Memorials for Grants of Land 1810-26', GM 168, SLV.

husbands under the convict labour system.³⁴ Under the scheme, the master or mistress of the assigned prisoner was required to feed, clothe and shelter the prisoner-cum-labourer or servant as directed by the Imperial government:

And whereas such persons as are or shall become settlers [in New South Wales] ... may be desirous of availing themselves of the labour of part of the convicts who are or may be sent there, it is our will and pleasure that, in case there should be a prospect of them employing any of the said convicts to advantage, that you assign to each grantee the service of any number of them that you may judge sufficient to answer their purpose, on condition of their maintaining, feeding and clothing such convict in such a manner as shall appear satisfactory to you and to our Governor of New South Wales for the time being.³⁵

The practice of assigning convicts to free settlers commenced when free people and emancipated convicts began to acquire land, starting with freed convict James Ruse in 1789. The objective was three-fold; to provide assistance for landholders with labour intensive farming practices, to rehabilitate convicts and to reduce Imperial expenditure by getting those in charge of assigned convicts to provide for their board, clothing and food. The assignment scheme did not differentiate between genders, meaning that male and female grantees were offered the same number of convicts. Rather, it was the size of the property that determined the number of prisoners assigned, not the gender of the property owner.

The assignment scheme enabled free wives to live and work beside their convict husbands, to keep the family together and to work the land. Yet this was not necessarily guaranteed. For this to occur, a wife had to formally apply to the governor or a magistrate for her husband to be assigned to her and it was the official's decision whether to grant the request or not. If the convict husband had much needed skills that would benefit the colony or government, the request was liable to be declined. However, by 1817 when the need for skilled

³⁴ Women in charge of assigned convicts were called 'mistresses' by colonial officials, as shown in the following quote: 'when any female convict servant shall receive ill treatment from her master or mistress, she is ... to make her complaint to the Magistrate of the district who is minutely to investigate such complaint...' Government and General Order, 24 July 1813, *Sydney Gazette*, 24 July 1813, p. 1.

³⁵ Instructions to Governor Bligh, 25 May 1805, *HRA 1*, Vol. 6, p. 13.

labour had diminished somewhat, convict husbands were 'always assigned to their wives off the store'.³⁶

One such free woman who had her convict husband assigned to her was Mary Collitts. She arrived in the colony with her convicted husband, Pierce, on the *Minorca* in 1801, both aged approximately twenty-nine. Pierce had been sentenced to transportation for fourteen years. Upon arrival, Mary — and not Pierce — was described as the head of the family group as she was free while her husband completed his sentence.³⁷ In 1803, she applied for land and was granted a river-fronted property of seventy acres in Castlereagh. The purpose of the grant was noted as being for cultivation. As a free wife of a convict, the grant was in Mary's name and it was she who decided how to cultivate the property and manage its losses and profits and she was legally responsible for any contracts signed.

To assist her in working the land, Mary was assigned her husband as a servant-cum-labourer. From 1803 to 1812, Mary's assistance and activities in working on the farm were limited as she gave birth to six children during this period, nearly one every two years. Therefore, her time would have been largely taken up with caring for babies and young children, coupled with the physical limitations that may have resulted from pregnancy. As such, the assistance from her assigned husband was most needed.

In the patriarchal society that was colonial New South Wales, the assignment of a convict husband to his mistress wife turned the couple's relationship on its head. Previously, Mary was expected to obey Pierce as the dutiful wife, since 'the relation of marriage produces authority on one side, and exacts obedience on the other' but now Pierce was expected to obey Mary.³⁸ It was now *her* responsibility to ensure Pierce was adequately fed, clothed and housed according to government regulations. It was *her* right to put him to work in a manner she deemed most appropriate, either on the farm or within the home. It was *her* right to seek redress in court if he disobeyed the law or worked unsatisfactorily. Pierce, though, was not powerless in this mistress-servant relationship. Pierce had some rights as a convict that

³⁶ Macquarie to Bathurst, 31 March 1817, *HRA 1*, Vol. 9, p. 241.

³⁷ 'Free Passengers NSW Arrivals 1788-1825', *Biographical Database of Australia Online* <www.bda-online.org.au/> (18 August 2017).

³⁸ S. Johnson, *The Works of Samuel Johnson: Journey to the Hebrides, Tales of the Imagination, Prayers and Sermons*, Vol. 9, Oxford, 1825, p. 299.

he could exercise, both within and outside the court system. If he believed his mistress-wife was treating him unfairly, he could take her to court and seek to be re-assigned. Conversely, he could be a resistive servant, although that would have harmed his own future prospects, especially as he might eventually possess the property and its assets once he became free from servitude. Pierce received his freedom around 1806. Mary's grant was then incorporated and consolidated into his assets. With Mary treated as a *feme covert*, her property now became his. Thus, Pierce was described that year as possessing a seventy-acre, cultivated farm with some livestock. In 1816, he was given an additional land grant in Castlereagh. In 1825 Pierce became a master of convict William Powell, thereby completing the colonial circle of disempowerment and re-empowerment, from a convict whose legal rights were suspended to an emancipated man with full legal capabilities.

* * *

In the colony's formative decades, the transfer of land ownership between settlers was transacted in such a haphazard manner that property disputes were commonplace, as illustrated in the case study of Jane Ezzey, a free wife of a convict. Until the 1810s, the sale of land often simply entailed exchanging the land title or grant for money or goods without registering the change in ownership with government officials. This was despite numerous government orders explicitly stating that all land purchases were to be registered with the colonial office.³⁹ Consequently, ownership was difficult to substantiate and was often dependent on who actually held the original deed or certificate at the time, or on whether one person's word was believed against another (unless, of course, there were witnesses to the transaction).

Land disputes were contested in court and notices were placed in the local newspaper, the *Sydney Gazette*, notifying the public of rightful ownership. In hearing and deciding cases concerning property possession that were not registered with the colonial office, the Court of Civil Jurisdiction was complicit in the colony's illegal land transactions as they ignored the English laws of conveyancing.⁴⁰ One woman who asserted her right of possession was Jane Ezzey. In 1792, free wife Jane, her convict husband William Ezzey and their newborn

³⁹ Kercher, *An Unruly Child*, p. 51; Kercher, *Debt, Seduction and Other Disasters*, pp. 122-23.

⁴⁰ Kercher, *An Unruly Child*, p. 51.

daughter sailed to New South Wales aboard the *Royal Admiral*. At the time, Jane was approximately twenty-two years old while William was about twenty-seven. William had been sentenced to seven years transportation for the crime of stealing a wooden cask of yeast from his employer, with a combined value of twenty-one shillings.⁴¹ During the 130 day journey from England, Jane was kept company by a number of other free wives of convicts, including Lydia Austin, Anne Kennedy and Elizabeth Waring.

In May 1797, Jane was granted thirty acres of land in Mulgrave Place by Governor Hunter, with rent of a shilling per year which was to commence after five years. In July 1800, nine acres of wheat and an acre of barley had been cultivated and four acres of Indian maize was soon to be sown. As a free wife of a convict, Jane was legally the proprietor of 'Ezzeys farm' and she owned all the proceeds of cultivation. As a result, she had the ability to sell the land for a nominated price without consultation or consent from William, since his legal status denied him any involvement or agency in the matter.

In 1801, William, now emancipated, obtained a thirty-acre property in Mulgrave Place, not far from Jane's farm. The land was productive and soon twenty-five acres were cleared and cultivated with wheat and barley. The farm also produced twenty bushels of wheat, eighty bushels of maize and twenty hogs.⁴² In 1804, William received a further 130 acres at Windsor. Together with fifteen other men who received similar grants at the same time, this land was granted 'in trust for the benefit of their children'.⁴³ Two years later, he acquired, through both grant and purchase, 159 acres at Hawkesbury where he resided with Jane, their six children and an assigned servant named Christopher Savage. In 1811, William was listed as a resident of Hawkesbury and Castlereagh Street in Sydney, where he had been granted a beer license. The 1814 muster described William as a landholder in Windsor.⁴⁴

⁴¹ *Proceedings of the Old Bailey Online*, <www.oldbaileyonline.org/browse.jsp?foo=bar&path=sessionsPapers/17911207.xml&div=t17911207-37> (17 August 2017).

⁴² 'Settlers' Muster Book 1800: Land and Stock held by Free Settlers, Officers or Expired or Emancipated Convicts', *Biographical Database of Australia Online*, <www.bda-online.org.au/> (17 August 2017).

⁴³ *Sydney Gazette*, 4 November 1804, p. 3.

⁴⁴ 'Ezzey, William', *Biographical Database of Australia Online*, <www.bda-online.org.au/> (17 August 2017).

Until the 1810s, Jane and William lived as a couple and raised their children together. By 1814, the relationship had soured and Jane was living with John Boulton, an emancipated convict who had arrived in the colony in 1799 on the *Hillsborough*. John was well acquainted with the Ezzeys, as some years before, John and William had acquired a property together in Windsor, known as the Boulton-Ezzey farm. As a further testament to their friendship, John was charged in 1812 with illegally harbouring Jane and William's son, William, after he had absconded from his apprenticeship. In October 1811, John and William advertised the sale of their property in the *Sydney Gazette*, which came complete with a commodious house, fourteen head of cattle, seven horses, pigs, a cart, chaise and harness, agricultural equipment and house furniture. At the same time, William put an additional advertisement in the same newspaper, informing the public of the sale of a 130 acre 'capital stock farm', fifty acres of which was fenced. Both sales were initiated because the two men (no mention was made of their families) were preparing to leave the colony in 1812.⁴⁵ Neither William nor John ended up leaving New South Wales.

In 1816, Jane and William separated colonial style. Although divorce was only granted under the most exceptional of circumstances, married couples could informally terminate their legal obligations under coverture by inserting advertisements in the local press informing the public of their split. While such advertisements did not legally end the marriage — they were still technically husband and wife and unable to remarry — it did sever financial bonds and obligations, particularly the husband's responsibility for his wife's debts. In October 1816, William used the *Sydney Gazette* to notify that:

Whereas my wife, Jane Ezzey, has absented herself from my house at Mulgrave Place; the inhabitants are hereby cautioned against giving credit to the said Jane Ezzey on my account, after this notice, as I will not be responsible for any debts she may contract.⁴⁶

On the same page, John Ezzey, Jane and William's son, contested Jane's ownership of the Boulton-Ezzey farm:

The public are hereby cautioned against purchasing, taking any manner of security on, or entering into any agreement with my mother, Jane Ezzey, for a moiety or

⁴⁵ *Sydney Gazette*, 26 October 1811, p. 4.

⁴⁶ *Ibid.*, 26 October 1816, p. 1.

half that farm and premises situate at Windsor, known by the name of Bolton [sic] and Ezzey's Farm, she having possessed herself of the deeds, thereof, contrary to the wish of me ... and my father, William Ezzey of Windsor, who had duly conveyed to me, by a written indorsement [sic], a due right and title to the said land and premises: therefore I will not acknowledge nor accede to any contract or agreement she may make concerning it.⁴⁷

A week later, Jane placed a notice defending her credibility and her entitlement to what she regarded as her land:

... in reply to a notice that appeared in the Gazette of last week, signed 'Wm Ezzey;' wherein the said William Ezzey has wantonly and maliciously attempted to injure my credit in the colony, I hereby call to remembrance of all with whom I have had dealings in trade, that I always received, paid, and contracted as a *feme sole*, and not as the wife of the aforesaid Wm. Ezzey; who has in consequence no claim upon me whatsoever, and no right whatever with any part of my business; and in answer to another advertisement in the same Gazette, signed 'John Ezzy [sic],' cautioning persons against covenanting with me for the purchase of a moiety of a farm near Windsor, called Bolton and Ezzy's [sic] Farm, because of his having received the same as a gift from William Ezzy [sic], I the undersigned do hereby positively aver, that the purchase of the whole of the said farm was originally made by me, and that the right of possession to the said moiety is now vested in me, and me only, as it is my intention more fully to make [known] on the opening of the Supreme Court.⁴⁸

Jane's notice illustrates a number of interesting points. It is her identity as a businesswoman, particularly her 'dealings in trade', rather than as a wife, that most concerned her. Thus, it is her credit and financial security as a businesswoman she sought to defend, rather than her honour, reputation or status as a married woman. In securing her land, Jane had made use of colonial procedures and customs, especially those pertaining to free wives of convicts under which she was treated like as a single woman, free from the disabilities imposed by coverture. Jane was fully aware of her unique legal situation and rights as a

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 2 November 1816, p. 2.

former free wife of a convict, as evident in her use of the term *feme sole*. This demonstrates a shrewd business acumen and a fine understanding of the nuances of the colony's legal system and culture, both used to their fullest advantage.

* * *

From the mid-1810s, there was a curtailing of free women's capacity to own property. In 1816, Mary Collicott, a free wife of felon, Thomas Collicott, was denied a grant of land in her name. With a growing family and her husband still in servitude, Governor Macquarie felt some sympathy towards Mary and sought to lessen her hardships by providing her family with additional land. The property, however, was given to her son:

Mrs Collicott is an interesting respectable woman and with so large a family to provide for is much to be pitied. I have put herself and her whole family in the meantime on the store, and intend giving her eldest son a grant of land very soon with the usual indulgence granted here to free settlers, the father not being yet eligible for receiving a grant of land in his own name, on account of his still labouring under the sentence of the law ...⁴⁹

Mary Collicott's request for a grant of land was very similar to that of Sarah Toole and yet her request was denied. Why was Mary denied the land while Sarah received a grant in her own name, even though it was issued a year after Mary's request? The answer partly lies with their family structures. In issuing grants, preference was given to free adult males over free women. In Sarah's case, her sons were too young to be granted land and her husband was an attainted convict. Therefore, Sarah was the only person within the family unit who could possibly own property. Conversely, the fact that Mary's son was an adult overrode her status as a temporary *feme sole* and so he became the property holder. This not only illustrates the fluidity of land ownership but also women's place within the legal system and as landowners.

This shift away from free women's capacity to possess land from the mid-1810s can be explained by the development of the penal colony into a free settler society.⁵⁰ With greater numbers of free people residing in the colony and the desire to own land increasing, the value

⁴⁹ Macquarie to Goulburn, 22 March 1816, *HRA 1*, Vol. 9, pp. 97-98.

⁵⁰ Robinson, *op. cit.*, p. 263.

of land as a commodity rose, a commodity to be used in the most industrious (and profitable) of ways. In 1821, Eliza Walsh, a single free woman who arrived in the colony in 1819, requested a grant of land to expand her agricultural and pastoral activities, but her request was denied, 'it being contrary to late regulations to give grants to ladies'.⁵¹ As Governor Macquarie explained:

I consider it a very bad practice (except in some extraordinary and pressing cases of necessity) and very injurious to the interests of the colony to give grants of land to single women, I have declined for some time past making such grants, on the ground that such persons are incapable of cultivating land, and thereby not adding to the resources of the colony. Some tracts of land, granted by my predecessors to women and children many years since, remain still unimproved and unprofitable.⁵²

Unhappy with this, Eliza presented her case to the Commissioner of Inquiry, John Thomas Bigge complaining that 'it does not appear altogether a just measure to exclude ladies from making use of their money for the benefit of the colony in consequence of their sex, nor can it be deemed a real objection that a lady could not be able to conduct a farm as well as a gentleman'.⁵³ Eliza, after petitioning Governor Brisbane, was eventually granted 338 acres in 1823.⁵⁴ This shift in fortunes demonstrates both the dynamic change in women's legal capabilities, especially concerning land ownership, and the shifting nature of free women's agency.

Women's land ownership was also curtailed by stricter colonial legal practices which resulted in laws becoming less malleable. The arrival of trained lawyers in the colony saw a rise in bureaucratic and fastidious colonial-administration practices and the reshaping of the colonial legal system, especially after the passing of Parliament's 1823 *New South Wales Act* clarified the reception of English law in the colony (albeit problematically), making it harder for settlers to circumvent

⁵¹ Macquarie to Walsh, 1 January 1821, SANSW 4/1832.

⁵² Macquarie to Bigge, 23 January 1821, SANSW 4/1832. See also, S. Morgan, *Land Settlement in Early Tasmania: Creating an Antipodean England*, Melbourne, 1992, p. 26.

⁵³ Walsh to Bigge, c. 1821, SANSW 4/1832.

⁵⁴ Memorial of Eliza Walsh, 5 March 1822, SANSW 4/1832.

established law and practice.⁵⁵ With land transactions now registered, it became difficult for women to bypass their legal and economic disabilities and courts were less willing to ignore points of law, especially involving such legal practices as coverture and land conveyancing. The colonial government and courts further impeded women's ownership and interest in property from the mid-1810s by restricting, and then stopping, women's entitlement to the use of land under the common law of dower.

Essentially, dower entitled a wife to an equivalent of a nominal third share of her husband's freehold property upon widowhood for the remainder of her life, thereby providing her with financial security.⁵⁶ While the widow could not sell the land, she could lease or cultivate it, or use it as she deemed most appropriate.⁵⁷ Dower did not bestow ownership of the land on her, but rather an entitlement of occupancy or usage. In the colony's formative decades, dower was generally upheld because land was plentiful and the demand for it was easily met. This changed, however, from the mid-1810s when land became an increasingly valuable commodity in the colony. At this stage, dower became an impediment to the free market for land since a widow was entitled to a life interest in her share, something that could not be rescinded. As a result, the land temporarily claimed to her could not be sold. To redress this, Governor Macquarie proclaimed in 1819 that women would forfeit their dower rights 'to the sale of lands which they brought to the marriage'. In 1836, the right to dower was removed entirely with the passage of a law that declared a widow 'was no longer entitled to a proportion of her late husband's estate by right'.⁵⁸ Consequently, the claim of widowed wives to dower was eroded as

⁵⁵ A. Castles, *An Australian Legal History*, Sydney, 1971, p. 25; L. Ford and D. A. Roberts, "'Mr Peel's Amendments' in New South Wales: Imperial Criminal Reform in a Distant Penal Colony', *The Journal of Legal History*, Vol. 37, No. 2, 2016, pp. 198-214.

⁵⁶ The husband could dispose of the remaining two-thirds of the property however he chose, such as bequeathing it to his eldest son.

⁵⁷ Initially, there were no trained lawyers in the colony so colonial and legal officials were required to rely on legal books sent over from England and on their own insufficient knowledge. As a result, some of the law was adapted to fit the unique circumstances of the early penal colony and so differed from established English legal practices. Golder and Kirkby, 'Land, Conveyancing', p. 208.

⁵⁸ C. Bishop, *Minding Her Own Business: Colonial Businesswomen in Sydney*, Sydney, 2015, p. 212.

land was seen as a desirable asset, rather than part of a reciprocal relationship between spouses.⁵⁹

The inability of many free women, either single, married to free men or widowed, to actively engage in the buying and selling of land as the colony developed further demonstrates the unique legal and economic position free wives of convicts held in the colony. With their husbands' legal rights and capabilities suspended, they continued to be treated as *femes sole* and, therefore, could still possess land in their own names during this brief suspension of coverture. Yet as Mary Collicott's story illustrates, this was only possible if there were no other eligible free males within the family unit who could be granted land.

* * *

As a result of their marital status and the legal status of their convicted husbands, some free wives of convicts in the colony's early decades possessed and traded land in their own names. In doing so, they exercised a degree of agency that was denied to free wives married to free men. Through requests for land, they asserted their legal capacity and agency as they sought to improve the lives of their families. Others became mistresses of their assigned husbands, thereby turning the very notion of a married couple on its head. As illustrated in the case studies of Sarah Toole, Mary Collitts and Jane Ezzey, free wives of convicts explicitly used their unique position to better their situation through obtaining land. The case studies also illustrate a highly-nuanced colony where legal delineations had profound consequences for its residents and their future prospects. Within the overarching category of 'woman' there were further delineations, from free and convict to *feme sole* and *feme covert*, from being married to a free man to having a husband whose legal capabilities and rights were temporarily suspended. Individual women were affected differently and to varying degrees. It is for this reason that free wives of convicts are such historically important figures as they illustrate the intricate workings of the colony's legal, familial, social and economic realms and the evolving capabilities of the early colonists.

⁵⁹ N. Wright and A. Buck, 'The Transformation of Colonial Property: A Study of Dower in New South Wales, 1836-1863', *University of Tasmania Law Review*, Vol. 23, No. 1, 2004, pp. 98-99.